

BRENNAN

CENTER

FOR JUSTICE

CURBING FILIBUSTER ABUSE

Mimi Marziani, Jonathan Backer, and Diana Kasdan

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Ms. Marziani frequently writes on democracy issues, and has contributed opinion editorials to *U.S. News and World Report*, *The National Law Journal*, *Politico*, *The New York Law Journal*, among others. She has been a featured speaker in a range of academic, media and political forums, including at the influential Netroots Nation conference in July 2010. In September 2010, Ms. Marziani was invited to testify on the constitutionality of filibuster reform before the Senate Committee on Rules and Administration. Ms. Marziani also serves as an NYU adjunct professor at NYU's Wagner School of Public Service, teaching undergraduate students about how constitutional law influences public policy debates.

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EXECUTIVE SUMMARY

How can we make American government work better?

It is plain that this nation's problems can only be solved by parties working together through effective public institutions. But Congress has increasingly lost the capacity to make that happen. Over the past decade, time and again, the Senate failed to vote, or even deliberate, on bills that could address the serious issues facing our country. This must change. Ending the dysfunction that has gripped the United States Senate is a necessary first step. If Congress is to fulfill the people's mandate, the Senate must amend the rules that have become its tools for legislative dysfunction.

In 2010, the Brennan Center first issued a report on the causes and harms of current Senate dysfunction, *Filibuster Abuse*, and put forth a call for sensible reforms.¹ Building on those recommendations, this update provides empirical evidence of how rampant filibuster abuse continues to cause an unprecedented lack of legislative productivity. Of course, since 2010, Congress has been marked by a division of party control between the House and Senate. Does that account for the gridlock? Emphatically, no. A close study of the Senate's productivity shows that its paralysis stems from reasons well beyond divided government. The Senate continues to face an unprecedented, effectively permanent filibuster, which affects matters entirely within its own purview. These findings confirm that the Senate must act decisively, at the start of the 113th Congress, to put its house in order.

Why rules reform?

As findings in this update confirm, longstanding rules have become tools for legislative minorities to paralyze the Senate as a lawmaking institution. Under current rules, a minority of lawmakers has effective veto power over bills and nominees, derailing the legislative process. As a consequence, little happens. Even routine legislative matters and governmental appointments are frozen. As a matter of practice, a *de facto* 60-vote "supermajority" requirement applies to *all* legislation. This is not what America's founders had in mind. As Alexander Hamilton noted, requiring a supermajority substitutes "the pleasure, caprice, or artifices of an insignificant, turbulent, or corrupt [faction for] the regular deliberations and decisions of a respectable majority."²

As described in *Filibuster Abuse*, both constitutional structure and Senate history confirm that majority rule "binds both chambers with equal force."³ Indeed — except for extraordinary and explicitly designated situations such as expelling members — the Framers specifically rejected supermajority voting requirements after experiencing the consequences of legislative paralysis under the Articles of Confederation.⁴ But contrary to this constitutional design, the current Senate Rules impose an untenable supermajority requirement.

Reform of these rules is necessary for overcoming the current state of Senate dysfunction and congressional gridlock. Filibuster abuse devalues the Senate as an institution, cripples Congress, and undermines the proper operation of government — which was meant to function with three branches, not two.⁵ For instance, the government cannot properly fund operations when the Senate fails to pass a single appropriations bill, as it has this year. Similarly, courts are left without adequate resources when the Senate ignores its constitutional responsibility to approve or reject judicial nominees.

Filibuster Abuse is Rampant:

- As of October 2012, the current Congress has enacted 196 public laws, the lowest output of any Congress since at least World War II. This is not purely the result of divided party control of chambers. Control of the House and Senate was also divided from 1981 to 1987 and 2001 to 2003.
- The current Senate passed a record-low 2.8 percent of bills introduced in that chamber, a 66 percent decrease from 2005-2006, and a 90 percent decrease from the high in 1955-1956.
- Cloture motions — the only way to forcibly end a filibuster — have skyrocketed since 2006, creating a *de facto* 60-vote requirement for all Senate business.
- In the last three Congresses, the percentage of Senate floor activity devoted to cloture votes has been more than 50 percent greater than any other time since at least World War II, leaving less time for consideration of substantive measures.
- On average, it has taken 188 days to confirm a judicial nominee during the current Congress, creating 33 “judicial emergencies,” as designated by the Office of U.S. Courts. Only at the end of the congressional term in 1992 and 2010 have there been more judicial emergencies.

The start of the 113th Congress offers a rare opportunity to set the foundation for reform. On the first day of the legislative session, senators can enact changes in the Standing Rules of the Senate with a simple majority vote, instead of the 67-vote threshold normally required to change the rules. A group of newly-elected, reform-minded senators, joining with an increasing number of like-minded veteran senators, bring reform of Senate Rules within reach.

At the start of the current session two years ago, Senate leaders attempted to bring a modicum of efficiency through an informal understanding. But this “gentleman’s agreement,” which in part was supposed to reduce filibusters, had no discernible impact. Pledges of comity alone cannot rein in procedural abuse. Obstructionist tactics by the minority — and retaliatory measures by the majority — cannot be curbed until the rules permitting these tactics are modified.

After detailing the growth in obstruction over the past six years, this report offers a blueprint for mitigating the worst abuses, while preserving a role for minority input. Commonsense reform is necessary for the Senate to effectively address the challenges the country faces in the 21st century.

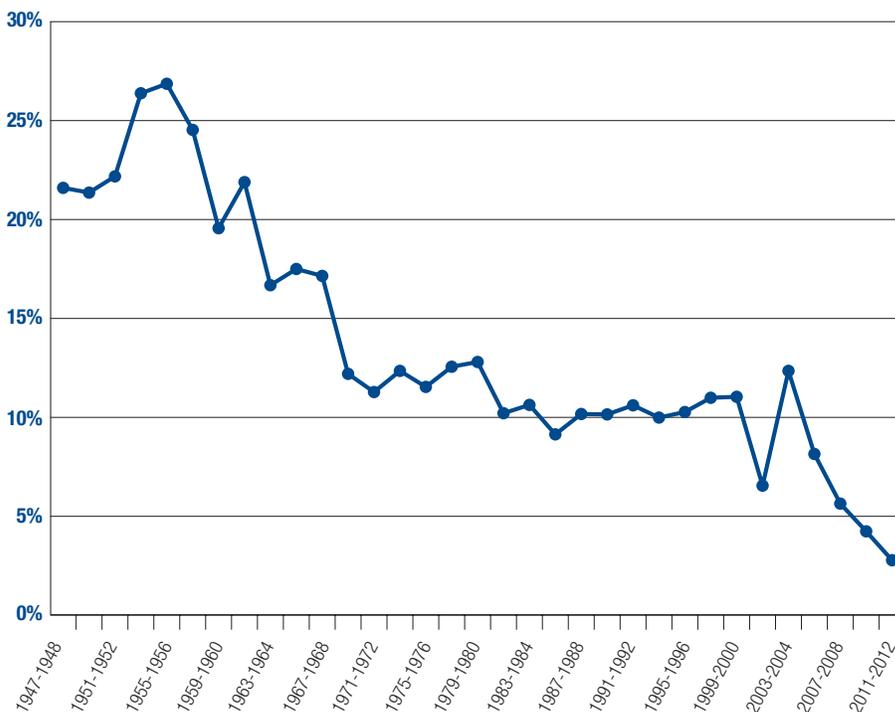
I. SENATE OBSTRUCTION REMAINS AT AN ALL-TIME HIGH

The current Congress has been markedly unproductive. *The New York Times* denounced the current Congress as “the least productive body in a generation.”⁶ Since at least World War II, no Congress has achieved a lower output.⁷

Further, split party control between the House and the Senate does not alone account for the productivity drop. From 1981 to 1987, Democrats controlled the House of Representatives and Republicans controlled the Senate. Despite the division of partisan control, Congress enacted an average of 587 public laws during each two-year span, compared to 196 by the current Congress.⁸

Another measure of decreased productivity: The Senate is passing fewer and fewer of its own bills. During this Congress, the Senate passed a record low 2.8 percent of bills introduced in the chamber, a 66 percent decrease from 2005-2006, and a 90 percent decrease from the high in 1955-1956.⁹

Senate Bills Passed as Percentage of All Bills Introduced



A key contributing factor to this gridlock is Senate time spent responding to persistent filibuster abuse and related procedural tactics.

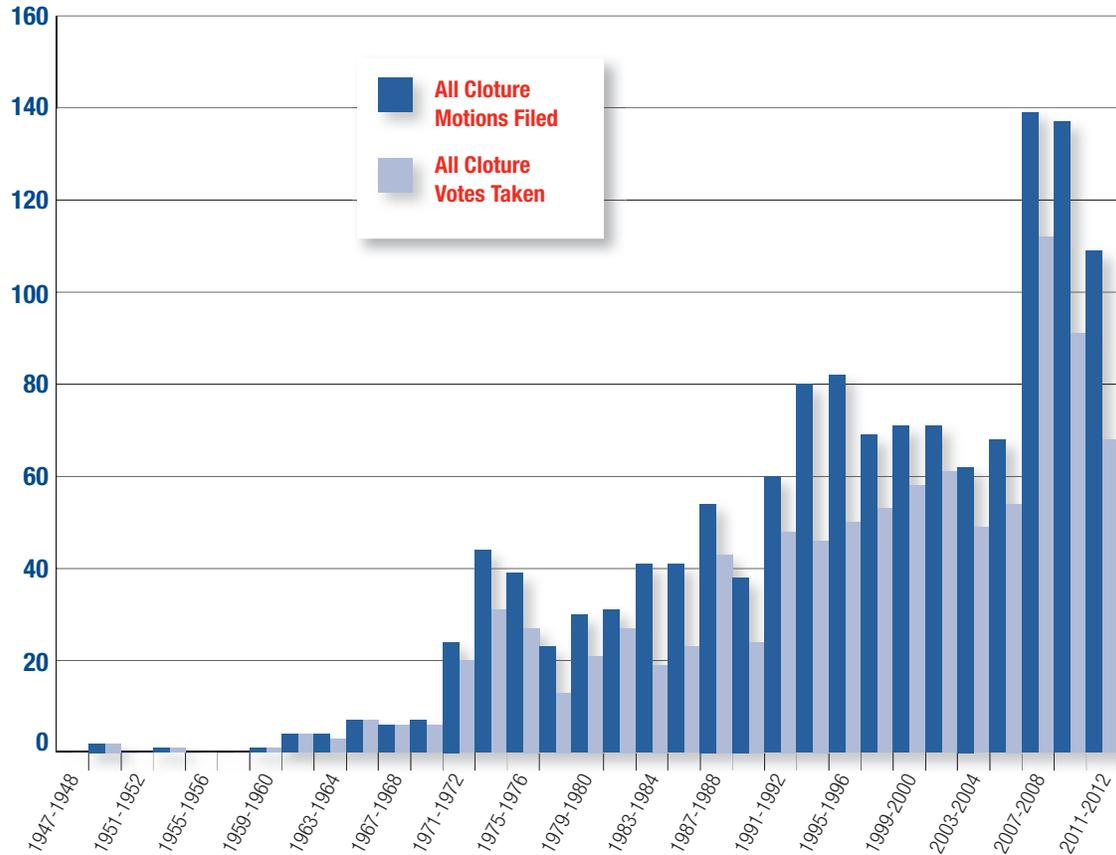
Defining Obstruction

The term “filibuster” refers to any dilatory tactic deployed to block legislative action. Unlike the House of Representatives, the Senate lacks any procedure permitting a simple majority to force a debatable measure to an up-or-down vote. The only way to overcome a filibuster and end debate is through Senate Rule XXII, commonly known as the “Cloture Rule.” Yet, for a cloture motion to pass, a 60-vote “supermajority” is necessary. Even if a cloture motion is adopted, Senate Rules permit up to an additional 30 hours of debate before a final vote. While a successful invocation of cloture may end the minority’s ability to block legislation from facing a vote, it hardly silences them entirely.

Although related, filibusters and cloture motions are two distinct procedural features. There can be a filibuster without a cloture vote and vice versa. Even the mere threat of filibuster is often sufficient to stop a measure. And cloture motions are sometimes filed as a preemptive strike against a possible filibuster. All this procedural wrangling results in the Senate spending more time on legislative maneuvering than on substance.

Today, the threat of a filibuster shapes nearly every Senate action. As a result, cloture motions — now the standard method for moving forward a contested measure — have reached record numbers.¹⁰ Since 2006, 385 cloture motions have been filed. This is greater than the total number of cloture motions filed in the 70 years between 1917 (when the Cloture Rule was created) and 1988 (the last year of Ronald Reagan’s presidency).¹¹ But this measure underestimates the frequency of filibusters, as it does not even account for bills that are abandoned or nominations that are withdrawn due to the mere threat of a filibuster.

Cloture in the Senate



Sixty votes are now presumed necessary to conduct regular Senate business — as if constitutionally mandated.

When the political parties are rigid and polarized, 60 votes must come completely from the majority party. Since Hawaii and Alaska joined the Union in 1959, one party has held a majority with 60 or more members during just 8 of 27 Congresses. This includes the 111th Congress, when the Democratic Party held 60 votes briefly — between July 2009 (when the race for Minnesota’s Senate seat was decided in Al Franken’s favor) and February 2010 (when Senator Scott Brown won a special election to replace the Massachusetts Senate seat left empty by Ted Kennedy’s death).¹²

60 VOTES ARE ASSUMED TO BE REQUIRED FOR LEGISLATIVE ACTION

THE INDIANAPOLIS STAR

EPA Climate Change Measure Fails in Senate

Apr. 7, 2011 – Indiana’s senators voted Wednesday to block the Environmental Protection Agency from enforcing regulations limiting greenhouse gas emissions... [T]he GOP proposal...**needed 60 votes to pass.**

NEW YORK POST

Abortion Services Agreement Was Final Hurdle

Apr. 9, 2011 – A truce on funding for the abortion-services group Planned Parenthood paved the way for the last-minute budget deal... The proposal to cut the group’s funding is expected to fail in the Senate, where **60 votes are needed for passage**, sources said.

The New York Times

Senate Votes Down a Delay in Rules on Debit Card Fees

June 9, 2011 – The Senate refused Wednesday to delay new rules that would sharply cut the fees that banks can charge to retailers to process debit card transactions... Although 54 senators voted in favor of the delay, the measure failed to garner the **60 votes that were required for it to pass under Senate Rules.**

Star Tribune

NEWSPAPER OF THE TWIN CITIES

Senate Vote Keeps Ethanol Tax Credit Alive

June 15, 2011 – The U.S. Senate on Tuesday chose not to kill a multibillion-dollar annual tax credit that now provides major support for ethanol producers and corn farmers in Minnesota and other states... [T]he amendment **received just 40 of the 60 votes it needed.**

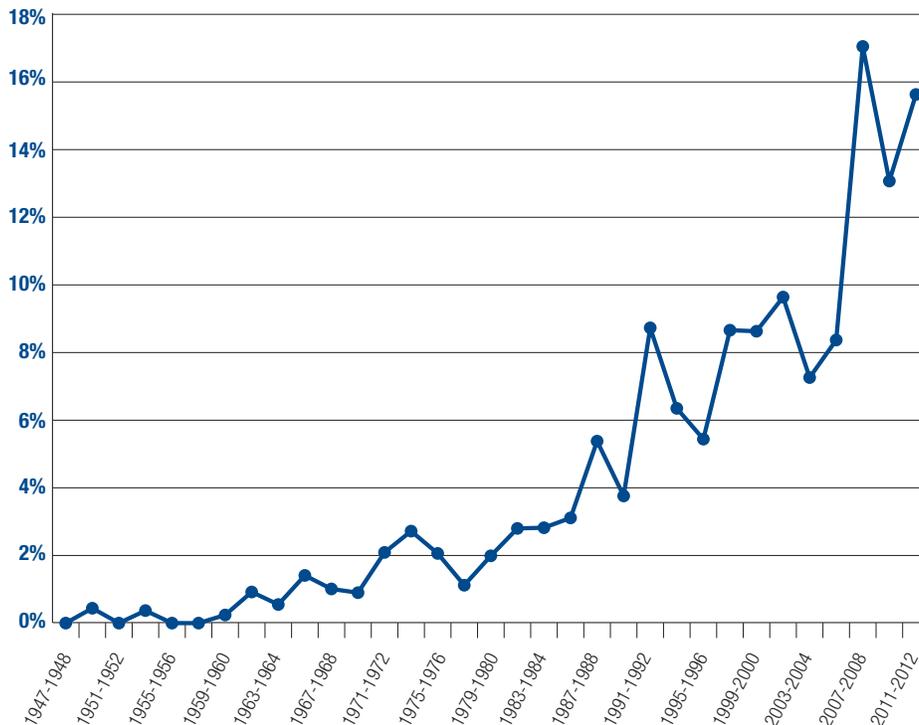
Moreover, today’s filibusters have little in common with filibusters of the past. Traditionally, filibustering senators had to stand up on the Senate floor and actually speak. The filibuster was a device to slow consideration of legislation so objecting senators could persuade colleagues and the public. By contrast, the modern filibuster requires almost no effort. Senators typically send a short email to the Senate majority leader threatening obstruction. Unless the majority can find the 60 votes needed to move forward, that bill or nominee is effectively removed from consideration.

In fact, most bills are blocked long before they even reach the Senate floor. By filibustering a “motion to proceed” — the motion that begins consideration of a measure — an obstructionist can kill a bill early, avoiding all public debate. Plus, one successful cloture vote does not clear the way for passage. Senators committed to grinding the chamber’s activity to a halt can filibuster at six different points in the legislative process.¹³ And, successful cloture votes do not trigger instant advancement; each time, the obstructionists can force the Senate to wait up to 30 additional hours before proceeding.

The majority party has responded to this relentless obstruction by subjecting its legislative agenda to triage, stripping the number of measures on which the chamber acts to a bare minimum. A significant indicator of Senate obstruction is the proportion of overall Senate votes to end filibusters.

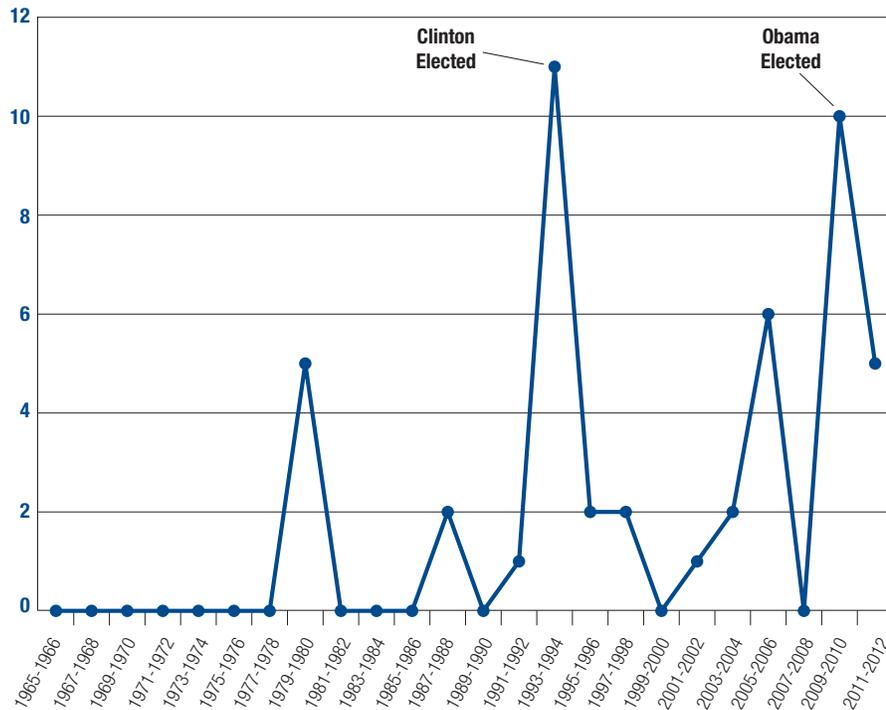
Between 1961 and 2006, cloture votes have gradually increased as a percentage of Senate floor activity, although never consuming more than 10 percent of the chamber’s total roll call votes.¹⁴ But, over the past three Congresses, cloture votes have averaged more than 15 percent of all recorded votes — a 50 percent increase over the previous high during the first two years of President George W. Bush’s administration. The largest absolute percentage of votes devoted to breaking filibusters since at least World War II was between 2006 and 2008, when Democrats controlled both chambers.

Votes to Break Filibusters as Percentage of All Senate Votes

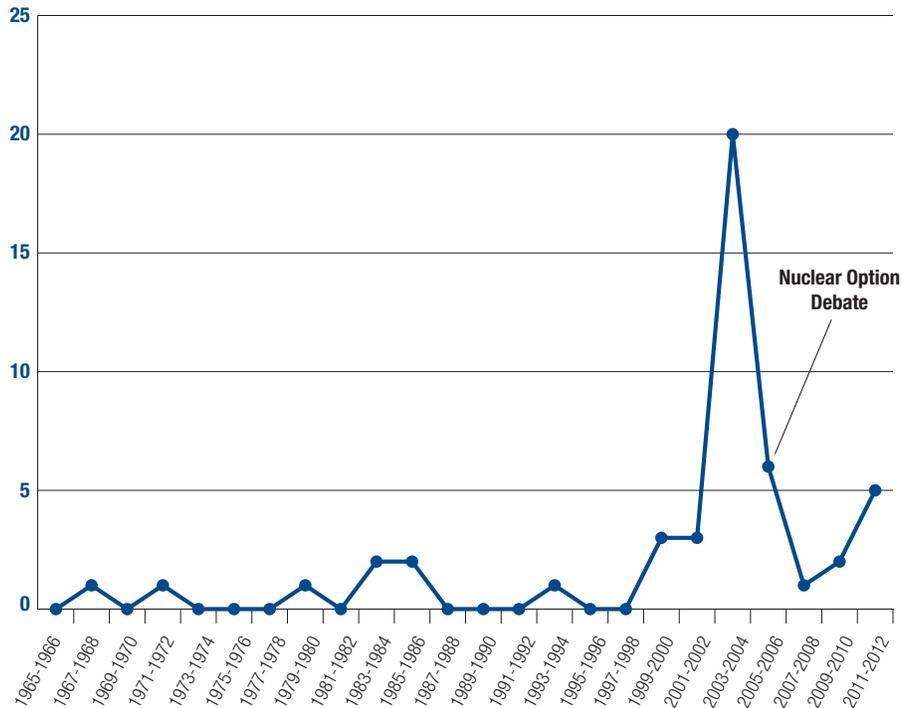


In addition, the Senate has disregarded its constitutional obligation to provide “advice and consent” on executive and judicial appointments. Notably, since the House of Representatives plays no role in confirming judicial and executive appointments, divided control has no bearing on Senate inactivity on appointments.

Cloture Votes: Executive Nominees¹⁵



Cloture Votes: Judicial Nominees



The current number of cloture votes on judicial nominees in this Congress is nowhere near the record set during the 108th Congress when Democrats relentlessly filibustered judicial nominees. (This ultimately pushed then-Majority Leader Bill Frist [R-Tenn.] to threaten, in the middle of the congressional term, eliminating filibusters for judicial appointments.)¹⁶ But such comparisons mask other measurements that show delay for delay's sake has become the norm.

According to the Alliance for Justice, the 2010 confirmation process for judicial nominees took an average of 150 days even for nominees who were eventually confirmed with *no* minority opposition.¹⁷ In the current Senate, it has taken an average of 188 days to confirm a judicial nominee.¹⁸ The Senate has confirmed only two judges nominated in 2012, and it did not confirm its first — Judge Michael A. Shipp — until 182 days after his nomination.¹⁹ The lag was not due to concern about Judge Shipp's qualifications: He was ultimately confirmed by a vote of 91-1.²⁰

Unwarranted delay has led to a record number of “judicial emergencies.” These are vacancies that the Office of U.S. Courts believes could harm a jurisdiction's ability to handle its caseload. Currently, 33 have emergency status.²¹ Since the Office created the designation in 1988, there have only been more emergencies at the end of a Congress twice — in 1992 and in 2010.²² Unless the Senate confirms a large number of judges during the lame duck session in December 2012, there will be markedly more judicial emergencies than when President Obama took office in 2009.²³ As U.S. Supreme Court Chief Justice John Roberts wrote two years ago, the Senate's failure to confirm judicial nominees is “a persistent problem” creating “an urgent need for the political branches to find a long-term solution to this recurring problem.”²⁴

II. RULES REFORM IS NECESSARY

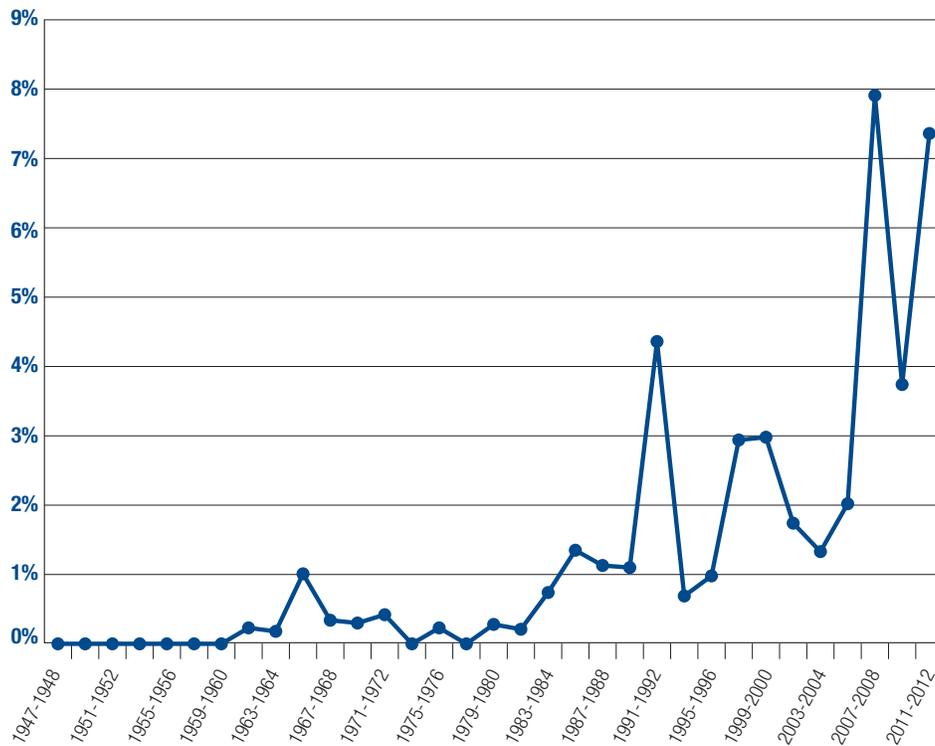
The empirical data underscores that the Senate can no longer operate according to its archaic rule book — which requires a level of comity long lost. The Senate’s rules must be reformed.

Informal agreements are insufficient to return the Senate to functionality. Two years ago, at the start of the current 112th Senate, rules reform gave way to a handshake deal. Senate Majority Leader Harry Reid (D-Nev.) and Senate Minority Leader Mitch McConnell (R-Ky.) vowed to “make the Senate a better institution” through “fewer filibusters and procedural delays and more opportunities for debate and amendments.”²⁵ Specifically, McConnell agreed to reduce filibusters on motions to proceed, while Reid agreed to reduce the use of a tactic called “filling the amendment tree.” In general, when the amendment tree is filled, no further amendments can be offered. There are a number of procedural variations on how the Majority Leader can fill the tree, but all have the same result — they prevent the minority from having a say in shaping legislation.²⁶

But this “gentleman’s agreement” was ineffective on both sides.

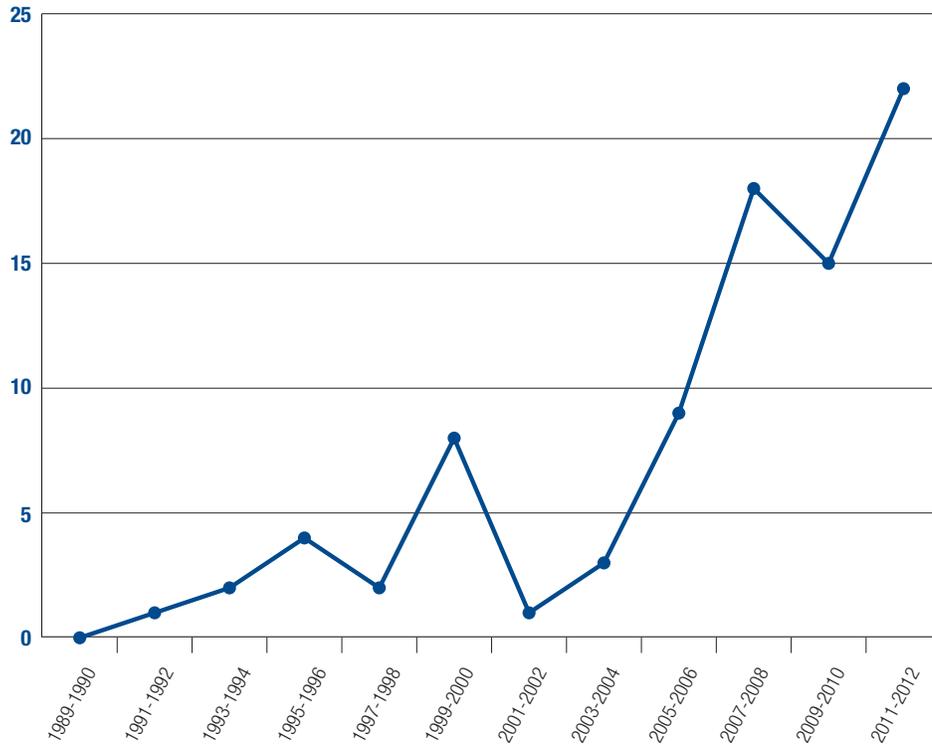
The percentage of all Senate votes devoted to invoking cloture on motions to proceed has climbed 95 percent from the 111th Congress to the current, 112th Congress, nearly reaching the record of the 110th Congress.²⁷

Votes to Break Filibusters on Motion to Proceed as Percentage of All Senate Votes



The majority showed the same disregard for the “gentleman’s agreement” as did the minority, setting a new record for filling the amendment tree.²⁸ Specifically, during the current Senate, the minority filled the amendment tree 22 times — a 47 percent increase from the previous Congress.²⁹

Number of Bills Without Opportunity for Minority Amendments



III. ROBUST REFORM CANNOT WAIT

The Senate Rules must be amended to facilitate debate, deliberation, and, eventually, substantive decision-making. Permitting filibusters at up to six different points in the legislative process frustrates these goals. There should only be one opportunity to filibuster any given measure or nomination.

It should also be more difficult for obstructionists to delay action preferred by the majority. The Rules should place a burden on those obstructing action preferred by the majority. This can be accomplished by amending the Senate Rules to require at least 40 votes to sustain a filibuster rather than requiring a supermajority to break a filibuster. Similarly, filibustering senators should be required to stay on the Senate floor and actually debate, as was true in the past. By ensuring that there are costs associated with the filibuster, the minority will be forced to decide what issues merit the time, energy, and lost political capital of obstruction.

It is also problematic that under the current rules, the minority is offered insufficient opportunities to influence and shape legislation backed by the majority. Safeguards are needed, for instance, to ensure that members of the minority can offer amendments. This can be accomplished by changing Senate Rules so that a minimum number of slots on the “amendment tree” are reserved for the minority.

Obstructionist tactics by the minority — and the majority — will not be curbed until the rules that permit abuse are recalibrated. Senate Rules reform is the only way to accomplish this. The minimal, commonsense reforms offered here can help achieve this by limiting the filibuster to a tool reserved for matters of exceptional importance. Such basic reforms are a start, not a finish, for the task of retooling the Senate for the 21st century.

ENDNOTES

- ¹ See MIMI MARZIANI, BRENNAN CTR. FOR JUSTICE, *FILIBUSTER ABUSE 1* (2010), available at http://brennan.3cdn.net/d71924f77ec6e2aa64_3vm6b37f4.pdf.
- ² THE FEDERALIST NO. 22, at 120 (Alexander Hamilton) (Barnes & Noble ed., 2006).
- ³ See MARZIANI, *supra* note 1, at 1.
- ⁴ Emmet J. Bondurant, *The Senate Filibuster: The Politics of Obstruction*, 48 HARV. J. ON LEGIS. 467, 469, 480 (2011).
- ⁵ See MARZIANI, *supra* note 1, at 5-10.
- ⁶ Jennifer Steinhauer, *Congress Nearing End of Session Where Partisan Input Impeded Output*, N.Y. TIMES, Sept. 18, 2012, at A21, available at <http://www.nytimes.com/2012/09/19/us/politics/congress-nears-end-of-least-productive-session.html>.
- ⁷ See *Résumé of Congressional Activity*, http://www.senate.gov/pagelayout/reference/two_column_table/Resumes.htm (last visited Oct. 18, 2012); *Laws Passed by the 112th Congress*, CONGRESS-SUMMARY.COM, http://www.congress-summary.com/B-112th-Congress/Laws_Passed_112th_Congress_Seq.html (last visited Nov. 11, 2012).
- ⁸ *Party Division in the Senate, 1789-Present*, U.S. SENATE, http://www.senate.gov/pagelayout/history/one_item_and_teasers/partydiv.htm (last visited Nov. 10, 2012); *Party Divisions in the House of Representatives (1789-Present)*, OFFICE OF THE CLERK OF THE U.S. HOUSE OF REPRESENTATIVES, http://artandhistory.house.gov/house_history/partyDiv.aspx (last visited Nov. 10, 2012); *Résumé of Congressional Activity*, *supra* note 7.
- ⁹ Data taken from *Résumé of Congressional Activity*, *supra* note 7.
- ¹⁰ All cloture motion statistics are taken from *Senate Action on Cloture Motions*, U.S. SENATE, http://www.senate.gov/pagelayout/reference/cloture_motions/clotureCounts.htm (last visited Oct. 18, 2012).
- ¹¹ *Id.*
- ¹² See *Party Division in the Senate*, *supra* note 8; Monica Davey & Carl Hulse, *Franken's Win Bolsters Democratic Grip in Senate*, N.Y. TIMES, July 1, 2009, at A1, available at <http://www.nytimes.com/2009/07/01/us/politics/01minnesota.html>; Michael Cooper, *G.O.P. Senate Victory Stuns Democrats*, N.Y. TIMES, Jan. 20, 2010, at A1, available at <http://www.nytimes.com/2010/01/20/us/politics/20election.html>.
- ¹³ See Memorandum from Senator Judd Gregg to Republican Senators on Tools for Senate Obstruction (Dec. 1, 2009), available at <http://talkingpointsmemo.com/documents/2009/12/judd-greggs-blueprint-for-gop-obstruction.php?page=1>; RICHARD S. BETH & STANLEY BACH, CONG. RESEARCH SERV., RL30360, *FILIBUSTERS AND CLOTURE IN THE SENATE 11-12* (2003), available at <https://opencrs.com/document/RL30360/2003-03-28/download/1005/>.
- ¹⁴ Percentage of floor activity devoted to breaking filibusters calculated by dividing number of cloture votes, taken from *Senate Action on Cloture Motions*, *supra* note 10, by the total number of votes for each Congress, taken from *Résumé of Congressional Activity*, *supra* note 7.
- ¹⁵ Data taken from *Senate Action on Cloture Motions*, *supra* note 10.
- ¹⁶ Gwen Ifill, *Majority Leader Threatens to Change Senate Filibuster Rules*, PBS NEWSHOUR, Apr. 25, 2005, http://www.pbs.org/newshour/bb/politics/jan-june05/judges_4-25.html.
- ¹⁷ ALLIANCE FOR JUSTICE, *FILIBUSTERS, SECRET HOLDS, AND OBSTRUCTION OF JUDICIAL NOMINEES 2* (2010), available at <http://www.afj.org/judicial-selection/afj-report-filibusters-of-judicial-nominations.pdf>.
- ¹⁸ Calculation based on data from *Confirmation Listing*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ConfirmationListing.aspx> (last visited Oct. 26, 2012).
- ¹⁹ See *id.*

- ²⁰ *Vote Number 182, U.S. Senate Roll Call Votes 112th Congress, 2nd Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=112&session=2&vote=00182 (last visited Oct. 23, 2012).
- ²¹ *Judicial Emergencies*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/JudicialEmergencies.aspx> (last visited Nov. 11, 2012).
- ²² JUDICIAL CONFERENCE OF THE U.S., REPORT OF THE PROCEEDINGS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES 31 (1988), *available at* <http://www.uscourts.gov/FederalCourts/JudicialConference/Proceedings/Proceedings.aspx?doc=/uscourts/FederalCourts/judconf/proceedings/1988-03.pdf>; *Archive of Judicial Vacancies*, ADMIN. OFFICE OF THE U.S. COURTS, <http://www.uscourts.gov/JudgesAndJudgeships/JudicialVacancies/ArchiveOfJudicialVacancies.aspx> (last visited Nov. 10, 2012).
- ²³ ALLIANCE FOR JUSTICE, THE STATE OF THE JUDICIARY: JUDICIAL SELECTION DURING THE REMAINDER OF PRESIDENT OBAMA'S FIRST TERM 17 (2012), *available at* <http://www.afj.org/judicial-selection/state-of-the-judiciary-may2012.pdf> (indicating 20 judicial emergencies when Obama took office in January 2009).
- ²⁴ CHIEF JUSTICE JOHN ROBERTS, U.S. SUPREME COURT, 2010 YEAR-END REPORT ON THE FEDERAL JUDICIARY 7-8 (2010), *available at* <http://www.supremecourt.gov/publicinfo/year-end/2010year-endreport.pdf>.
- ²⁵ 157 Cong. Rec. S324-25 (daily ed. Jan. 27, 2011) (colloquy between Sens. Harry Reid and Mitch McConnell).
- ²⁶ BETSY PALMER, CONG. RESEARCH SERV., 98-953, THE AMENDING PROCESS IN THE SENATE 8-23 (2007), *available at* <https://opencrs.com/document/98-853/2007-11-26/download/1005/>.
- ²⁷ Data taken from *Senate Action on Cloture Motions*, *supra* note 10.
- ²⁸ In general, filled trees can be identified by examining data from the Legislative Information System of the U.S. Congress and looking for instances of successive amendments offered by the Majority Leader. Legislative Information System data is available at THOMAS, <http://thomas.loc.gov/home/thomas.php> (last visited Oct. 22, 2012).
- ²⁹ We replicated the process of identifying filled amendment trees described in Memorandum from the Cong. Research Serv. to Senator Tom Coburn 4-5 (Oct. 7, 2011), *available at* http://www.coburn.senate.gov/public//index.cfm?a=Files.Serve&File_id=86a87020-75dc-4335-b192-ced34c6b8bd1 for bills from the 112th Congress. For the 101st through the 111th Congress, we relied on data from *id.* at 7-21.

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